

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Iowa Network Access Division
Tariff F.C.C. No. 1**

WC Docket No. 18-60

Transmittal No. 36

**MOTION OF AT&T SERVICES, INC.
TO AMEND PROTECTIVE ORDER AND
FOR EXPEDITED RULING**

Pursuant to 47 C.F.R. § 1.41, AT&T Services, Inc. (“AT&T”) respectfully submits this motion for a limited amendment of the Commission’s March 26, 2018 Protective Order (*Protective Order*) to permit a very limited set of additional individuals to access “Confidential” information in this proceeding. The *Protective Order* allows access by outside consultants, and the proposed change would allow the use of inside consultants, provided that those individuals are providing technical or expert advice and are not involved in “Competitive Decision-Making,” as that term is defined in the *Protective Order*.

In light of the compressed time frame set out in the Commission’s April 19, 2018 Order Designating Issues for Investigation (*Designation Order*), AT&T respectfully requests: (i) expedited consideration of this motion, with a three business day period for any opposition; (ii) waiver of the five-day waiting period for its cost analyst, Daniel P. Rhinehart, so that access to “Confidential” information will be granted on the same day he files an Acknowledgment; and (iii) amendment of the *Protective Order* to require each party to provide—on the date of submission—all supporting data, including “Confidential” information, to any party who has been authorized to review “Confidential” information.

BACKGROUND

On November 8, 2017, the Commission entered an order in the formal complaint proceeding between AT&T and Iowa Network Access Division d/b/a Aureon (“Aureon”), finding that Aureon had violated the Commission’s rate cap and rate parity rules.¹ That order further noted that AT&T had “raised a number of significant questions about Aureon’s CEA practices and rates that deserve further exploration. These include Aureon’s treatment of network investment, its cost allocations, and the role of lease costs involving the regulated entity and a competitive services affiliate.”² The Commission also directed Aureon to file a revised interstate tariff in compliance with the *Liability Order*.³

The disclosure of sensitive business information in that complaint proceeding was governed by a separate protective order (the *Complaint Proceeding Protective Order*), which permitted Aureon’s senior business executives to review both “Confidential” and “Highly Confidential” information. AT&T initially opposed this approach on the ground that business executives involved in “Competitive Decision-Making” (as that term is defined in the *Protective Order* at issue here) should not be permitted access to “Highly Confidential” information.⁴ For its part, Aureon did not deny that its senior business executives were engaged in “Competitive Decision-Making,” but instead insisted that such access was necessary for Aureon to be able effectively participate in the complaint proceeding.⁵ In an effort to resolve this issue amicably, AT&T agreed to permit the four senior Aureon business executives designated by Aureon to review AT&T’s “Highly Confidential” information; however, Aureon still objected to this

¹ See *AT&T Corp. v. Iowa Network Services, Inc., d/b/a Aureon Network Services*, Memorandum Opinion and Order, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001, FCC 17-148, 32 FCC Rcd 9677 (Nov. 8, 2017) (“*Liability Order*”).

² *Id.* ¶ 30.

³ *Id.* ¶ 35.

⁴ See AT&T Letter to the Enforcement Bureau Staff, dated Feb. 17, 2017.

⁵ See Aureon Letter to the Enforcement Bureau Staff, dated Feb. 17, 2017.

compromise and the issue was litigated. In a Letter Ruling dated February 24, 2017, the Enforcement Bureau adopted AT&T's compromise proposal and Aureon's senior business executives (as well as four designated AT&T employees) were permitted to review, during the course of the complaint proceeding, all "Confidential" and "Highly Confidential" information, other than "Highly Confidential" information designated as such by third parties and produced in other proceedings pursuant to separate protective orders that did not allow access by any non-attorneys.⁶

Pursuant to the *Complaint Proceeding Protective Order*, both parties produced "Highly Confidential" information during the complaint proceeding that their designated business representatives were permitted to review. This material included a large number of documents designated as "Highly Confidential" that Aureon made available in support of the reasonableness of its Centralized Equal Access ("CEA") rates. Further, the record on which the Commission based its decision in the *Liability Order* included much of that information, as well as three declarations submitted by Daniel P. Rhinehart, an AT&T cost analyst, who was permitted access under the *Complaint Proceeding Protective Order* to all of the "Confidential" and "Highly Confidential" information produced by Aureon. At no time during the course of the complaint proceeding did Aureon object to Mr. Rhinehart's review of any of this material.

There are four aspects of the *Complaint Proceeding Protective Order* that bear on the present motion.

⁶ *AT&T Corp. v. Iowa Network Services, Inc., d/b/a Aureon Network Services*, Letter Ruling, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001, FCC 17-148 (Feb. 24, 2017) (*Complaint Proceeding Protective Order*). The only "Highly Confidential" information that Aureon's senior business executives were not permitted to review was material previously produced in other proceedings, including material produced by third parties.

- *First*, the *Complaint Proceeding Protective Order* contains two levels of protection: “Confidential” and “Highly Confidential,” the latter designation being given to the most sensitive business data.
- *Second*, the *Complaint Proceeding Protective Order* permits any designated individual to have access to “Confidential” information (including employees of a Reviewing Party asked to “furnish technical or other expert advice or service”), so long as that individual is willing to abide by the terms of that protective order.
- *Third*, that order also permits Counsel, Outside Consultants and four business executives designated by each party to have access to “Highly Confidential” information, irrespective of whether any of those designated individuals was involved in Competitive Decision-Making. As previously noted, in reliance on the structure proposed by Aureon, AT&T designated Mr. Rhinehart—an AT&T cost analyst who is not involved in Competitive Decision-Making—as one of its four designated business executives.
- *Fourth*, the *Complaint Proceeding Protective Order* required each individual to wait two days before accessing “Confidential” or “Highly Confidential” material after filing a declaration.

On February 22, 2018, and in compliance with the *Liability Order*, Aureon filed Transmittal No. 36, proposing tariff revisions to its interstate access Tariff F.C.C. No. 1 (“Tariff Filing”). Because that Tariff Filing raised many of the same concerns identified in the *Liability Order*, AT&T filed a petition to reject or suspend Aureon’s Tariff Filing, together with a declaration by Mr. Rhinehart discussing in general terms the deficiencies in Aureon’s Tariff Filing. Aureon opposed that Petition, but did not object to Mr. Rhinehart’s declaration. Taking the parties’

submissions under consideration, the Wireline Competition Bureau entered an order on February 28, 2018 suspending Aureon's Tariff Filing,⁷ and it later entered the *Protective Order* that is the subject of this motion. Both of those orders, as well as the subsequent *Designation Order*, recognize the factual and legal overlap between the issues in this proceeding and the issues in the complaint proceeding.

The *Protective Order* in this investigation differs from the *Complaint Proceeding Protective Order* in several significant respects.

- *First*, the *Protective Order* contains one level of protection —“Confidential” information; it does not contain a “Highly Confidential” designation. ¶ 2.
- *Second*, it restricts access to “Confidential” information to Counsel and “Outside Consultants.” Consequently, it does not permit employees, like Mr. Rhinehart, who are asked to “furnish technical or other expert advice or service,” to have access to “Confidential” information, even if those employees are not engaged in Competitive Decision-making. ¶ 2.
- *Third*, it has a five-business-day waiting period (instead of two) after an individual files an Acknowledgment. ¶ 5.
- *Fourth*, it only requires a Submitting Party to provide a complete set of “Confidential” documents within two business days to each Reviewing Party, upon request. ¶ 7.

Given the differences between the two protective orders and AT&T's heavy reliance on Mr. Rhinehart's expertise (both in the complaint proceeding and in connection with this proceeding), AT&T approached Aureon (prior to the issuance of the *Designation Order*) about the

⁷ *In the Matter of Iowa Network Access Division Tariff* F.C.C. No. 1, Order, WC Docket No. 18-60, Transmittal No. 36 (Feb. 28, 2018) (*Suspension Order*).

possibility of modifying the *Protective Order* to provide for two levels of protection and/or to permit internal cost analysts (like Mr. Rhinehart) who are not involved in Competitive Decision-Making to the review both “Confidential” and “Highly Confidential” on a similar basis as the *Complaint Proceeding Protective Order*. Aureon refused. Initially, Aureon simply took the position that it was “comfortable” with the *Protective Order*. More recently, it has asserted that some unspecified Aureon and third party information should not be shared with Mr. Rhinehart and other cost analysts that are not involved in Competitive Decision-Making. As explained below, there is no legitimate basis for Aureon’s unprincipled and opportunistic reversal of position.

ARGUMENT

I. THE COMMISSION SHOULD PERMIT ALL INDIVIDUALS PROVIDING EXPERT ADVICE TO ACCESS CONFIDENTIAL INFORMATION, PROVIDED THEY ARE NOT ENGAGED IN COMPETITIVE DECISION-MAKING

A. There is a Presumption of Public Access to Cost Support Materials Submitted in Tariff Proceedings.

“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j). This includes the use of protective orders to safeguard confidential information from disclosure. To that end, the Commission has adopted a Model Protective Order, declining to restrict categorically the set of individuals who could access such information—“such limitations,” it held, “may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the documents.”⁸ In particular, the Model Protective Order expressly permits “Authorized Representatives” of Reviewing Parties to access “Confidential” information, including employees, if they are “requested by counsel to furnish

⁸ *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, 13 FCC Rcd. 24816, ¶ 26 (1998) (“Report and Order”).

technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings.”⁹

The Commission has recognized that in some cases it would be appropriate to “limit[] access to documents to outside counsel and experts,” but the “party seeking this additional degree of protection must justify its request when filing a request for confidential treatment.”¹⁰ To this end, the Commission has at times adopted protective orders with two levels of protection – the second level applying to “Highly Confidential” information and limiting the disclosure to “Counsel” and “Outside Consultants.”¹¹ In such instances, the concern has been to ensure that business executives engaged in “Competitive Decision-Making” are not permitted access to highly sensitive business data.¹² Further, this added protection is generally not extended to all “Confidential” information but to situations where there is a threat of competitive disadvantage.¹³ In other instances, the “serious consequences of violating a Commission protective order make this limitation unnecessary.”¹⁴

Where tariff proceedings are concerned (as compared for example to merger proceedings), the Commission has been hesitant to limit public inspection of materials in the manner sought here by Aureon. Historically, the Commission has “withheld such information from public inspection only in limited circumstances, such as when it has been necessary to protect third-party vendor data.”¹⁵ To obtain a protective order in tariff proceedings, the submitting party must “include[] with the tariff filing a showing by a preponderance of the evidence that the data should be accorded confidential treatment ... or make[] a sufficient showing that the information should be subject to

⁹ *Id.* at App’x C, ¶ 7.

¹⁰ *Id.* ¶ 26.

¹¹ *See, e.g., Applications Charter Commc’ns*, 30 FCC Rcd. 10360 (2015), ¶ 16.

¹² *Id.*

¹³ *Id.* ¶¶ 16-17, 21.

¹⁴ Report and Order ¶ 26.

¹⁵ *Id.* ¶ 35.

a protective order.”¹⁶ This requires the submitting party, “at a minimum,” to “comply with Section 0.459(b) and (c) of the rules regarding the supporting information that must be included in its request for confidentiality.”¹⁷ One factor the Commission must consider in determining whether to issue a protective order is whether the submitting party would be placed “at a competitive disadvantage” should the information be disclosed.¹⁸ There is no publicly available explanation by Aureon for restricting access of their confidential material to persons like Mr. Rhinehart.

If a tariff investigation later occurs, as here, “the Bureau can make a further determination concerning the carrier’s entitlement to confidentiality.”¹⁹ And a party requesting access to the cost support materials need only make a “persuasive showing” that the materials should be released.²⁰

B. Access Should Be Granted to Aureon’s “Confidential” Materials, Subject to a Restriction on Competitive Decision-Making.

Given the standards above, as well as the unique circumstances of this case, AT&T’s cost analyst (Mr. Rhinehart) and other similarly situated individuals should be permitted access to “Confidential” information, subject to all the other provisions of the Protective Order.

First, as explained above, Aureon bears the burden of demonstrating by a “preponderance of the evidence” that any material submitted in support of its Tariff Filing should be afforded “Confidential” treatment.²¹ Further, Commission precedent makes clear that this burden is not always or automatically met, particularly as it relates to employees requested to “furnish technical or other expert advice or service” who are not involved in competitive decision-making.²² Aureon has provided no rationale that would justify preventing disclosure of “Confidential” information

¹⁶ *Id.* ¶ 37.

¹⁷ *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996*, 12 FCC Rcd. 2170, ¶ 91 (1997).

¹⁸ Report and Order ¶8.

¹⁹ *Id.* ¶ 37.

²⁰ *Id.* ¶¶ 15-18.

²¹ *Id.*

²² *Id.* ¶ 23.

to technical experts not involved in Competitive Decision-Making.

Second, in the unique circumstances of this case, Aureon's burden is particularly heavy. In the complaint proceeding, Mr. Rhinehart was permitted access both to material designated by Aureon as "Confidential" and as "Highly Confidential." That information related to the very same issues that are involved in this proceeding. Further, many of the documents requested in the *Designation Order* are similar to the material requested by AT&T and produced by Aureon in the complaint proceeding. In these circumstances, it is difficult to see how Aureon can demonstrate that it would be placed "at a competitive disadvantage" by providing Mr. Rhinehart or other similarly situated individuals with access to "Confidential" information. Because individuals like Mr. Rhinehart are not engaged in Competitive Decision-Making, the other limitations in the Protective Order are more than sufficient to prevent them from disclosing or otherwise using "Confidential" information. As the Commission has previously observed, the "serious consequences of violating a Commission protective order [therefore] make this limitation unnecessary."²³ Consequently, there is no sound reason for treating "Confidential" information in this proceeding differently than it was treated in the complaint proceeding.

Third, to the extent that there are specific materials that Aureon wishes to present in support of its Tariff Filing that it believes should not be disclosed to cost analysts like Mr. Rhinehart, the answer is not to bar Mr. Rhinehart and other similarly situated individuals from reviewing all "Confidential" information. Rather, the appropriate procedure under the Commission's rules would be for Aureon to request that a second level of protection be established, to identify the specific material to be designated for inclusion in that category, and then to demonstrate with particularity why a heightened level of protection is required for that material. To date, however,

²³ *Id.* ¶ 26.

Aureon has not indicated a willingness to even consider such a procedure, nor has it identified with any specificity the types of material that would require this additional level of protection or explained why this unidentified material needs additional protection beyond the protections that were provided in the *Complaint Proceeding Protective Order*. Moreover, given Mr. Rhinehart's role as a cost analyst who is not involved in Competitive Decision-Making, it is doubtful that Aureon could actually make such a showing.²⁴

Finally, amending the *Protective Order* to permit Mr. Rhinehart and other similarly situated individuals to review the same type of "Confidential" and "Highly Confidential" information produced in the complaint proceeding is also warranted because of the substantial overlap between the factual and legal issues in this investigation and in the complaint proceeding and because the structure of the *Complaint Proceeding Protective Order* (which permitted Mr. Rhinehart access to Aureon's "Highly Confidential" information) was proposed and rigorously advocated for by Aureon. As noted above, AT&T relied on that structure in presenting its case in the complaint proceeding. Further, the concerns expressed by the Commission in the *Liability Order* regarding Aureon's ratemaking practices were undoubtedly based, in part, on the analysis presented by Mr. Rhinehart in the three declarations he submitted in the complaint proceeding. In the record of this proceeding, the Commission should likewise have the benefit of that same analysis. Indeed, to deny Mr. Rhinehart access in this proceeding to the same type of "Confidential" and "Highly Confidential" information produced in the complaint proceeding would deprive both the Commission and AT&T of Mr. Rhinehart's technical expertise, and would

²⁴ To the extent that Aureon were to request a second level of protection, and the Commission were to elect to establish a second "Highly Confidential" level of protection, the Commission should make clear that in this proceeding the category is a narrow one, limited to material that truly involves third-party vendor data or implicates other serious competitive concerns. Aureon should not be permitted to designate as "Highly Confidential" material similar to the types of information it designated as either "Confidential" or "Highly Confidential" in the complaint proceeding and that an inside consultant like Mr. Rhinehart already has reviewed without issue.

result in a less than complete record.

C. Suggested Revisions to Protective Order

In order to provide Mr. Rhinehart and similarly situated individuals with access to “Confidential” information, AT&T recommends amending the Protective Order as follows:

- ¶ 2: Deleting the term “Outside Consultant” and replacing it with the following:
 - “Consultant” means a person retained for the purpose of providing Outside Counsel or a Participant in this proceeding with technical or other expert advice, provided that such person is not involved in Competitive Decision-Making.
- Replacing the term “Outside Consultant” with “Consultant” in the remainder of the Protective Order
- Amending the Acknowledgment, ¶ 7, as follows:
 - Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or Consultant to a party or as an employee of Counsel, Consultant, or Outside Firm, and I agree that I will not use such information in any other capacity.

II. THE COMMISSION SHOULD RULE ON AN EXPEDITED BASIS, WAIVE THE FIVE-DAY WAITING PERIOD FOR MR. RHINEHART, AND REQUIRE PARTIES TO MAKE ALL DATA (INCLUDING “CONFIDENTIAL” INFORMATION) AVAILABLE IMMEDIATELY UPON SUBMISSION TO ALL PARTIES WHO HAVE SIGNED AN ACKNOWLEDGMENT

In light of the compressed schedule in this tariff investigation, AT&T makes three additional requests.

First, AT&T requests that the Commission provide a three business day response period for this motion, similar to the three-day challenge period provided in paragraph 6 of the *Protective Order*, and rule on this motion prior to May 3, 2018, the date Aureon is required to submit its direct case.

Second, AT&T requests that the Commission waive the five-day waiting period in the *Protective Order* (see ¶ 5) as it relates Mr. Rhinehart so that he will have immediate access to “Confidential” information upon his filing of an Acknowledgment in this proceeding. To the extent that Aureon has specific objections to Mr. Rhinehart’s being provided access to “Confidential” information, those objections should be set forth in its response to this motion. Given the focus of the motion, there is no conceivable justification for imposing an additional five-day waiting period after the motion is decided. Indeed, such a requirement would greatly restrict Mr. Rhinehart’s ability to access “Confidential” information and assist AT&T in submitting its opposition to Aureon’s direct case.

Third, AT&T requests that the Commission make clear that the parties to this proceeding are required to make available copies of all supporting material (including “Confidential” information) as part of their direct and answering cases. As currently written, Paragraph 7 of the *Protective Order* requires Aureon to provide AT&T with a complete set of the documents designated as “Confidential” within two business days of submission. Given this proceeding’s compressed schedule, that requirement is not workable. Aureon’s direct case is due on Thursday, May 3. However, under the current language of the *Protective Order*, AT&T and other parties who have agreed to abide by the *Protective Order* would not be entitled to receive a copy of all “Confidential” information until Monday, May 7, leaving them with only a few days to prepare their oppositions, which are due on Thursday, May 10. Aureon would likewise experience the same problem in filing its Rebuttal case. To avoid this situation, AT&T therefore requests that the Commission require each party to make available (simultaneously with its filing with the Commission) to all parties who have signed an Acknowledgment, a complete set of its supporting data, including any and all “Confidential” information.

CONCLUSION

In view of the foregoing, AT&T requests that the Commission: (i) amend the *Protective Order* to permit individuals furnishing technical or expert advice, and who are not engaged in Competitive Decision-Making, to access “Confidential” information, subject to all other terms of the *Protective Order*; (ii) rule on this motion on an expedited basis, providing a three-day response period; (iii) waive the five-day waiting period for Mr. Rhinehart; and (iv) require each party to make available (simultaneously with its filing with the Commission) to each party who has signed an Acknowledgment, a complete set of its supporting data, including all “Confidential” information.

Respectfully submitted,

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Dated: April 23, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I caused a copy of the foregoing Motion to Amend Protective Order and for Expedited Ruling to be served via email on the following:

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